JR Lincks College of Higher Education v Majlis Perbandaran Melaka

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-02–330 OF 1999
ZALEHA ZAHARI, ZULKEFLI AND ABDULL HAMID EMBONG JJCA
28 FEBRUARY 2008

Civil Procedure — Amendment — Parties — Plaintiff's application to amend its name from trade name used in writ and statement of claim to company name — Whether genuine mistake and misnomer — Whether proposed amendment amounted to substitution of a party — Test to be applied — Rules of the High Court 1980 O 25 r 5

This was an appeal by the plaintiff/appellant against the High Court judge's refusal to grant the plaintiff's application for leave to amend the name of the plaintiff in the writ of summons and the statement of claim. The plaintiff's grounds of application was that the mistake which they sought to correct by way of an amendment was a genuine mistake and a misnomer, that the name 'JR Lincks College of Higher Education' was a trade name, whilst 'JR Lincks Educational Consultants Sdn Bhd' was the company's name. According to the plaintiff, the defendant had not been misled by this mistake, nor were they taken by surprise as they had full knowledge as to the real identity of the plaintiff. In objecting to the application, the defendant contended that the plaintiff was not a legal entity from the plaintiff's own admission and therefore, the action filed against the defendant was a nullity.

Held, allowing the appeal with costs:

(1) The applicable principle as provided under O 20 r 5(3) of the Rules of the High Court 1980 that the court would allow an amendment to correct the name of a party even if it amounts to substitution of parties if it was a genuine mistake which did not mislead or cause any reasonable doubt as to the entity suing or being sued. The test to be applied was whether the intended plaintiff or defendant could be identified by reference to a description which was specific to that particular case? (see para 9).

(2) In the circumstances of the instant case, there could be no doubt that the plaintiff could easily be identified as the aggrieved party/entity

which the defendant had dealt with relating to the matters stated in the pleadings. The name used, 'JR Links College of Higher Education' instead of 'JR Links Educational Consultants Sdn Bhd', was clearly usage of a wrong name; that it was but a misnomer and did not involve the substitution of a new party (see para 10).

(3) Further taking into consideration the conduct of and steps taken by the defendant, it was unlikely that there was any doubt in the mind of the defendant when they received the writ that the case concerned the plaintiff. The defendant clearly knew whom they were dealing with. In the circumstances, the defendant could not have been and was not confused as the identity of the party suing was clearly evident (see paras 11–12).

[Bahasa Malaysia summary

Ini adalah rayuan oleh plaintif/perayu terhadap penolakan oleh hakim Mahkamah Tinggi dalam memberikan permohonan plaintif untuk kebenaran meminda nama plaintif pada writ saman dan pernyataan tuntutan. Alasan permohonan plaintif adalah bahawa kesilapan yang dipohon untuk diperbetulkan melalui pindaan dan ia adalah kesilapan yang tulen dan nama yang tidak kena. Nama 'JR Lincks College of Higher Education' adalah nama perniagaan, sementara 'JR Lincks Educational Consultants Sdn Bhd' adalah nama syarikat. Menurut plaintif, defendan tidak diperdayakan dengan kesilapan tersebut, ataupun dikejutkan oleh kerana mereka mempunyai pengetahuan sepenuhnya mengenai identiti sebenarnya plaintif. Dalam membantah permohonan tersebut, defendan berhujah bahawa plaintif bukanlah satu entiti undang-undang daripada pengakuan plaintif sendiri dan oleh itu, tindakan yang difailkan terhadap defendan adalah terbatal.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Prinsip yang terpakai seperti yang diperuntukkan di bawah A 20 k 5(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ialah bahawa mahkamah akan membenarkan satu pindaan untuk membetulkan nama pihak walaupun ini bermakna penggantian pihak-pihak sekiranya ia adalah satu kesilapan tulen yang tidak mengelirukan ataupun menyebabkan sebarang keraguan atas entiti yang menyaman atau disaman. Ujian yang dipakai adalah, sama ada plaintif atau defendan yang dihasratkan dapat dikenalpasti melalui rujukan kepada satu gambaran yang spesifik kepada sesuatu kes? (lihat perenggan 9).

(2) Di dalam keadaan kes ini, tiada keraguan bahawa plaintif dapat dikenalpasti dengan mudah sebagai pihak/entiti yang terkilan yang defendan telah berurusan berhubung dengan perkara-perkara yang

dinyatakan di dalam pliding-pliding. Nama yang digunakan, 'JR Links College of Higher Education' dan bukannya 'JR Links Educational Consultants Sdn Bhd', adalah jelas penggunaan nama yang salah; dan ia adalah nama yang tidak kena dan tidak melibatkan penggantian satu pihak baru (lihat perenggan 10).

(3) Selanjutnya, mempertimbangkan tindakan dan langkah-langkah yang diambil oleh defendan, tidak mungkin bahawa terdapat keraguan dalam minda defendan apabila mereka menerima writ bahawa kes itu adalah berkenaan plaintif. Defendan jelas mengetahui dengan siapa mereka berurusan. Dalam keadaan ini, defendan tidak sepatutnya dan tidak terkeliru kerana identiti pihak yang menyaman terbukti dengan jelas (lihat perenggan 11–12).]

Notes

For cases on parties, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 561–567.

Cases referred to

Whittman v WJ Daniel & Co Ltd [1961] 3 All ER 796 (refd)

Legislation referred to

Companies Act 1965 ss 16(5), 121
Rules of the High Court 1980 O 20 r 5, O 20 r 5(3), O 25 r 5

Appeal from: Civil Suit No 22–58 of 1991 (High Court, Melaka)

Malik Imtiaz Sarwar (Amelly Kok with him) (Thomas Philip) for the appellant.
Hamid Sultan Abu Bakar (Sugandra Rao Naidu and Mohd Mustafa with him) (J Azmi & Associates) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] This is an appeal against the High Court judge's refusal to grant the plaintiff's (appellant before us) application leave to amend the name of the plaintiff in the writ of summons and the statement of claim. We allowed the appeal with costs on 14 February 2007. Our reasons are as follows.

[2] The plaintiff is a college of higher learning which conducted its business at Bastion House, Jalan Kota, Melaka. The plaintiff commenced proceedings on 26 August 1991 against the defendant (respondent before us) by which action they sought, inter alia, for declaratory and injunctive relief, damages for trespass, as well as other reliefs, following the direction of the defendant

prohibiting the plaintiff from continuing to occupy Bastion House Malacca. At the same time the plaintiff also filed an application for interim injunction pending disposal of the action.

[3] The defendant filed an unconditional appearance on 27 May 1991. Defence was filed on 16 August 1991. Both parties subsequently amended their statement of claim and statement of defence. Parties proceeded to take directions from the High Court pursuant to the summons for directions filed. It is on record that parties had, by way of statement of agreed facts, agreed that 'JR Links College of Higher Education' was the trading name of 'JR Links Educational Consultants Sdn Bhd' and that 'JR Links Educational Consultants Sdn Bhd' wholly owned 'JR Links College of Higher Education'. We took note of the fact that included in the agreed bundle of documents is a letter of approval dated 5 March 1990 issued by the chief registrar of Schools and Teachers of the Ministry of Education which letter is addressed to 'JR Links Educational Consultants Sdn Bhd'.

[4] The parties had agreed to rest their case based on written submissions without calling witnesses, and that submissions would be limited to one issue only, ie, whether the Chief Minister of Malacca had in any way interfered with the operation of the Bastion House?

[5] The action was set down for trial, fixed for hearing on 3 December 1996 (adjourned), 3 January 1997, 26 February 1997 and 22 April 1997, then 25 March 1998. Subsequently, on the hearing date of 1 June 1998, the defendant's solicitors applied for an adjournment on the ground that they were withdrawing themselves as solicitors. On the subsequent hearing date, 23 June 1998, the defendant's new solicitors, Tetuan J Azmi & Associates, informed the court that they had filed an application to strike out the plaintiff's claim for want of locus standi. The plaintiff then, on 16 July 1998, filed encl 112, an application to amend their name from 'JR Lincks College of Higher Education' to 'JR Lincks Educational Consultants Sdn Bhd' which application was fixed for hearing on 22 July 1998, ie, the same date as the defendant's application to strike out the plaintiff's suit.

[6] The ground upon which the plaintiff's application was grounded was that the mistake which they sought to correct by way of an amendment was a genuine mistake and but a misnomer. That the name 'JR Lincks College of Higher Education' is a trade name, whilst 'JR Lincks Educational Consultants Sdn Bhd' is the company's name. According to the plaintiff the defendant had not been misled by this mistake, nor were they taken by surprise as they had full knowledge as to the real identity of the plaintiff.

A **[7]** In objecting to the application to amend the defendant's argument was that the plaintiff is not a legal entity from the plaintiff's own admission of 'JR Lincks College of Higher Education' being their trade name, and had incorrectly stated their trading name, "JR Lincks College of Higher Education" instead of 'JR Lincks Educational Consultants Sdn Bhd' as the B plaintiff. As the party cited as plaintiff is not a legal entity, the action filed against the defendant was accordingly a nullity. It was further argued that the proposed amendment was not a correction exercise, but a substitution of a party. He then pointed out that s 16(5) of the Companies Act 1965 requires a company to sue and be sued in its own name, and that s 121 then provides C that a company is subject to penal consequences if it were to use any other name. He was of the view that O 25 r 5 of the Rules of High Court 1980 ('the Rules') does not apply to a case of neglect.

D **[8]** The High Court judge accepted the defendant's argument that the proposed amendment was not a correction exercise and/or misnomer, but a substitution of a party. He held that the plaintiff had not advanced cogent reasons to support the application for amendment. As the entity cited as plaintiff was admittedly not in existence from commencement of the action, E he then dismissed the plaintiff's application to amend with costs. Hence this appeal.

[9] Order 20 r 5(3) of the Rules provides that an amendment to correct the name of a party may be allowed under para (2) notwithstanding that the F effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued. The applicable principle as provided in O 20 r 5(3) of the Rules is that the G court would allow an amendment to correct the name of a party even if it amounts to substitution of parties if it was a genuine mistake which did not mislead or cause any reasonable doubt as to the entity suing or being sued. The test to be applied is, can the intending plaintiff or defendant be identified by reference to a description which is specific to that particular H case? If the answer is 'Yes', then an amendment can be allowed even where the correction involves substituting a different name altogether, and the name of a separate legal entity, even though this may be equivalent to substituting a new party. In *Whittman v WJ Daniel & Co Ltd* [1961] 3 All ER 796, the English Court of Appeal allowed an amendment to correct the name of the I defendant which was wrongly stated as 'WJ Daniels and Company (a firm)' instead of 'WJ Daniel and Company Ltd'. It was in that case held that there could be no doubt in the mind of the defendant when they got the writ that it was they whom the plaintiff intended to sue and that she had simply got their name wrong.

[10] We are of the view that in the circumstances of the present case there can be no doubt that the plaintiff could easily be identified as the aggrieved party/entity which the defendant had dealt with relating to the matters stated in the pleadings. The name used, 'JR Links College of Higher Education' instead of 'JR Links Educational Consultants Sdn Bhd', was clearly usage of a wrong name; that it was but a misnomer and did not involve the substitution of a new party.

[11] Further taking into consideration the conduct of and steps taken by the defendant in this case, it was unlikely that there was any doubt in the mind of the defendant when they received the writ that the case concerned the plaintiff. From the start it would appear that the defendant clearly knew whom they were dealing with. Their previous solicitors had filed an unconditional appearance, a statement of defence, then, an amended statement of defence. The statement of agreed facts was also agreed upon, as well as to the issue which the court was required to determine. Not only that, the hearing was well advanced before this technical challenge as to locus standi and entity of the plaintiff was raised. This clearly was an afterthought brought up by the defendant's new solicitors, who thought it prudent to attempt at that advanced stage to have the case struck out on a technicality rather than have the matter fully adjudicated on its merits based on the facts and documents that had already been agreed upon.

[12] In these circumstances we are of the view that the defendant could not have been, and was not, confused. The identity of the party suing was clearly evident ie the educational college situated at Bastion House. The defendant's suggestion, having responded in the manner they did, although they had knowledge of the matters in issue, maintained some doubt as the entity suing them, is fanciful, and we reject it.

[13] The appeal was accordingly allowed with costs and we directed the deposit to be paid to the appellants on account of taxed costs.

Appeal allowed with costs.

Reported by Sally Kee